CompTel ASCENT

June 9, 2004

VIA ELECTRONIC FILING

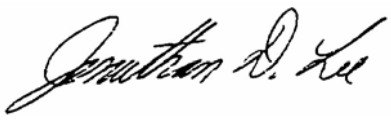
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *FNPRM on the Section 252(i) "Pick and Choose" Rule; CC Docket Nos. 01-338; 98-147; and 96-98*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, CompTel/ASCENT ("CompTel") hereby gives notice that on June 9, 2004, its representatives met with John Stanley, Matt Clements, Jeff Dygert, Bill Scher, Chris Killion, and Jeremy Miller of the Commission staff. In this meeting CompTel and the Commission staff discussed the attached *ex parte* letter. Representing CompTel were Mary Albert and the undersigned attorney.

Sincerely,



Jonathan D. Lee
Sr. Vice President,
Regulatory Affairs

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
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Re: *FNPRM on the Section 252(i) "Pick and Choose" Rule; CC Docket Nos. 01-338; 98-147; and 96-98*

Dear Ms. Dortch:

CompTel/ASCENT ("CompTel") submits this letter to request clarification that any rule changes the Commission is contemplating with respect to the "pick and choose" provisions of its current rules implementing Section 252(i) of the Telecommunications Act of 1996 will apply only to "picking and choosing" between provisions in *negotiated* interconnection agreements. As an initial matter, CompTel does not believe that the Commission, on the record cited in the FNPRM, was justified in adopting its tentative conclusion that the existing pick and choose rule frustrated the possibility of parties reaching negotiated agreements. Moreover, the subsequent record in this proceeding has only confirmed CompTel's initial observation. In fact, the record as developed, provides no factual corroboration of the Commission's postulated concern. Accordingly, CompTel's view that the Commission's rule implementing Section 252(i) does not merit reexamination has not changed from the beginning of this proceeding.[1]

Nonetheless, CompTel is concerned that Commission staff may be diligently trying to assemble an *ex post* justification for tentative conclusions that lacked any *ex ante* justification. CompTel fears that the item being prepared for the Commission to vote on will eliminate any use of the pick and choose provisions of the current rule, and require requesting carriers seeking to opt in to other agreements to adopt the whole agreement. According to the FNPRM, ILECs wishing to completely eliminate the use of pick and choose in the context of approved interconnection agreements need only file

[1] See Comments of CompTel and PACE Coalition at 6-7.

what is now—post Section 271—a largely superfluous SGAT. However, a scheme such as the one described in the FNPRM—if applied indiscriminately to all approved interconnection agreements (negotiated and arbitrated)—would jeopardize the goals the Commission says it seeks to promote, and would impose wasteful costs and inefficiencies on small carriers and public utilities commissions.

In other words, the Commission must limit the application of any tentative rule to those instances where the potential harm identified by the Commission (that subsequent requesting carriers may obtain benefits of negotiated agreements without adopting the corresponding concessions in the negotiated agreement)[2] may actually exist. The FNPRM offers no specific detail on this point. Yet, based on the Commission's articulated rationale for proposing changes to the existing rule, the only situations that were identified where current rule could conceivably produce disincentive effects would be in those instances where a requesting carrier was seeking to import provisions from one *negotiated* agreement into another negotiated, or arbitrated, approved interconnection agreement. Thus, approved interconnection agreements where the provisions sought to be "picked and chosen" for incorporation into another negotiated or arbitrated agreement were themselves arbitrated pose no threat to subsequent negotiations, because each term to be adopted was litigated and found to be fair and in compliance with the Act—and subject to federal court review to ensure that it is not inconsistent with the Act. Moreover, no such term—that was the subject of a Section 252 compulsory arbitration proceeding was a "quid" given up for a "quo."

Rather, the remedy of compulsory arbitration contained in the Act is itself designed to create incentives for parties to reach negotiated agreements in order to avoid the prospect of a "winner take all" outcome, which is always possible in the context of litigation. A blanket rule that exempted arbitrated outcomes from the "opt in" and "pick and choose" provisions of Section 252(i) would take a provision that was designed to encourage negotiation, and turn it into an invitation to ILECs to engage in *seriatum* exercises of bad faith litigation. The state administrative process would have to be wastefully engaged each time the requesting carrier wanted to do nothing more than construct an agreement out of multiple arbitration results.

In analogous circumstances, the Commission has found that forcing multiple arbitrations of a provision that a state has already arbitrated and decided would be evidence of bad faith. As a condition of the merger approval, Bell Atlantic/GTE voluntary agreed to either make interconnection agreements or provisions of agreements arbitrated in one state available to CLECs in other states or to submit the arbitrated agreements or provisions to immediate arbitration in the importing state without waiting for the statutory negotiation period to expire. In adopting this condition, the Commission concluded that it would not be appropriate for Bell Atlantic/GTE to require a requesting CLEC to arbitrate in the importing state a provision that previously was arbitrated and decided in that state as part of another agreement (except to the extent necessary to preserve its appellate rights). Indeed, the Commission noted that Bell Atlantic/GTE may be subject to penalties, fines or forfeitures if it attempted, in bad faith, to block or delay

[2] FNPRM at ¶ 722.

adoption of any whole interconnection agreement or interconnection provision arbitrated in any other Bell Atlantic/GTE state. [3]

Consistent with the Commission's conclusion in the Bell Atlantic/GTE Merger Order, it is easy to see that if all pick and choose rights were eliminated, then the ILEC, by being able to force meretricious litigation as of right, would have a new and powerful lever to delay and raise the costs of market entry by competitive carriers. Thus, the Commission's focus on the SGAT as a "backstop" ignores the *statutory* backstop to unsuccessful negotiations created by Congress when it included in the Act the remedy of compulsory arbitration. To sever the application of Section 252(i) to an equally-important sister provision in Section 252, would be to subvert the purpose of a critical statutory scheme that was Congressionally-designed to encourage negotiation between parties with asymmetric bargaining power. Indeed, regulators cannot reap the full benefit of the disincentive to bad faith negotiation that the compulsory arbitration remedy was designed to create, unless the losing party can continue to lose in successive instances based on its decision to not negotiate.

The situation of arbitration stands in stark contrast to the situation the Commission describes as unfair: where an ILEC that offers a concession in good faith in order to receive a corresponding benefit may have to continue to provide the concession in successive agreements, but fails to capture the bargained-for benefit in subsequent agreements. The Commission attempts to rationalize its entire proposed rule change based on one type of alleged situation where the modified rule would prevent a party from being punished for giving up a concession that leads to a negotiated agreement. However, by applying this rule to arbitrated agreements in addition to negotiated provisions, the Commission throws out the baby with the bathwater—and eliminates an important Congressionally crafted disincentive to litigation—that Section 252(i) in conjunction with the compulsory arbitration provisions of Section 252 substantially increase the costs of bad faith failures to negotiate, or unreasonable intransigence.

On the other hand, CompTel submits that there are effective ways for the contracting parties to protect themselves from such a possibility that do not involve diluting competitors' statutory rights. For example, the "most favored nation" condition that the Commission approved for the Bell Atlantic/GTE merger provided that Bell Atlantic/GTE would make available to a CLEC in any of its in-region states a whole interconnection agreement or any provision thereof voluntarily negotiated in any of its other states as long as the "requesting carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying agreement." [4] In the alternative, the parties to the original

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[3] *In re Application of GTE Corporation and Bell Atlantic Corporation For Consent To Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application To Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221 (released June 16, 2000), at ¶ 303 and n. 695.

[4] *Id*. at ¶ 301. In order to prevent discrimination, the Commission clarified that this language must be interpreted consistent with the *Local Competition Order* such that any terms and conditions an ILEC requires a CLEC to accept must be "legitimately related to the purchase of the individual [interconnection arrangement or network] element being sought. By contrast, incumbent LECs may not require . . .

contract could stipulate from the outset whether provisions were negotiated, and therefore ineligible to be "picked" or "chosen," or arbitrated.[5]

Finally, it should be of no small concern to the Commission that its tentative conclusions necessarily abut, and appear to conflict with, the state common law doctrine of collateral estoppel. As one court has explained, "[g]enerally speaking, the term 'collateral estoppel' refers to the judicially promulgated policy of repose preventing relitigation of a particular dispositive issue which was necessarily or actually decided with finality in a previous suit involving at least one of the parties on a different cause of action."[6] The Supreme Court has also ruled on this issue, "[t]he doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to quasi-judicial determinations of administrative agencies.[7]

Texas, also, applies the doctrines of *res judicata* and collateral estoppel to administrative proceedings before the public utility commission. In denying an electric utility a second chance to plead a rate increase case, the Texas Supreme Court said, "[w]e agree that the public utility regulatory scheme set forth by the legislature provides that once is enough. The doctrines of *res judicata* and collateral estoppel bar such relitigation before the Public Utility Commission."[8] Moreover, in the same case the Texas Supreme Court articulated a policy promoting even greater use of issue and claim preclusion in the regulatory context, "[v]oicing an awareness of the usefulness of *res judicata* in administrative proceedings, this court in *Westheimer Indep. School Dist. v. Brockette*, 567 S.W. 2d 780, 787 (Tex. 1978) expressed a strong preference that '[c]ontinued litigation of issues or piecemeal litigation should be discouraged' in state regulatory agencies."[9] New York courts, as well, agree with Texas and the Supreme Court.[10]

Given the clear state and federal court policies in favor of promoting adjudicatory economies—in both judicial and administrative fora—it is puzzling that the Commission would want to adopt a rule that promotes, if not compels, the imposition of adjudicatory diseconomies on both state commissions and small entity competitors. CompTel believes that this could not possibly have been the intention of the Commission in adopting its tentative conclusions, because the Commission completely failed to discuss this

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agreement to terms and conditions relating to other interconnection, services or elements in the approved agreement." *Id*. at fn. 689. There is nothing in the record to suggest that the RBOCs have not been able to adequately protect themselves and their quid pro quos through the use of contract language that requires a requesting CLEC to accept both the desired term and all reasonably related terms and conditions.

[5] *Id*. at ¶388, n. 724 (parties could stipulate which arrangements were voluntarily negotiated in interconnection agreements that result from Section 252 state arbitrations.)

[6] See *Morris v. Esmark Apparel*, 832 S.W.2d 563 (Ct of Appeals, Tennessee, Western Section 1991) citing *Gear v. City of Des Moines*, 514 F. Supp. 1218(S.D. Iowa 1981); *Montana v. United States*, 440 U.S. 147 (1979).

[7] *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). (Citations omitted.)

[8] See *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission*, 798 S.W.2d 560, 563 (1990).

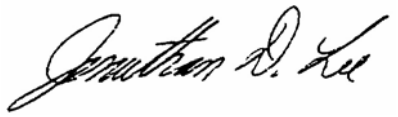
[9] *Id.*

[10] "The determination of an administrative agency is entitled to collateral estoppel effect if it is a quasi-judicial determination rendered pursuant to the agency's adjudicatory authority to decide cases." *Allied Chemical v. Niagara Mohawk Power Corp*., 129 A.D.2d 233, 235 (1987). (Citations omitted.)

possibility in its Initial Regulatory Flexibility Analysis in the FNPRM.[11] Therefore, in order to avoid the socially inefficient, costly, and exceptionally litigious results that will doubtlessly be created by a rule that indiscriminately forecloses the obvious and literal interpretation of Section 252(i), CompTel offers the attached modified rule for the Commission's consideration. CompTel believes that this amended rule would allow the Commission to achieve all of its stated objectives, while limiting any collateral damage to other provisions of the Act, or to established state common law. Accordingly, CompTel encourages the Commission to modify its pick and choose rule consistent with the proposed rule language that we have enclosed at the end of this letter.

Please do not hesitate to contact myself, or Mary Albert, at CompTel if you wish to discuss this matter in more detail. We can both be reached at 202-296-6650. Thank you in advance for your courteous consideration of our concerns.

Sincerely,



Jonathan Lee
Sr. Vice President,
Regulatory Affairs
CompTel/ASCENT
1900 M Street, N.W.
Suite 800
Washington, D.C. 200363

[11] See, e.g., FNPRM ¶ 789 (identifying potential for "poison pill" provisions that may discourage opting into agreements), ¶ 822 (proposed rules may require competitors to opt into entire agreements or negotiate their own agreements with incumbents), ¶ 825 (vague statement that proposed rules may impose additional burdens on CLECs, including small entities, but no specific discussion of what these burdens might be). Nowhere in the Commission's IRFA does the Commission mention the fact that the costs to small entity CLECs of obtaining interconnection agreements will likely rise precipitously due to the proposed elimination of existing incentives in the Commission's rules that encourage good faith negotiation (by reducing the cost to an ILEC of forcing competitors to arbitrate more frequently), and the additional costs that will likely be imposed on competitive carriers through needless repetitive litigation of issues at the state commissions.

51.809 **Availability of provisions of agreements to other telecommunications carriers under section 252(i) of the Act.**

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any **arbitrated** agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement. **An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement, together with any reasonably related terms and conditions, contained in any negotiated agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.** An incumbent LEC may not limit the availability of any individual interconnection service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular interconnection, service or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.